

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Complaint of Fibertechologies
Networks, LLC

)
)
)
)

D.T.E. 01-70

**SHREWSBURY’S ELECTRIC LIGHT PLANT’S
PROPOSED PROCEDURAL SCHEDULE
AND POSITION ON NATURE OF PROCEEDINGS**

Pursuant to a status conference held (via telephone) with the Department of Telecommunications and Energy (“Department” or “DTE”) on December 14, 2001, and the Department’s ensuing Hearing Officer memorandum dated December 17, 2001, the respondent in the above-captioned matter, Shrewsbury’s Electric Light Plant (“SELP”) hereby submits its proposed procedural schedule and position on the nature of these proceedings (i.e., whether evidentiary hearings are necessary.) For the reasons set forth below, SELP cannot at this time agree to follow a summary judgment process in lieu of formal evidentiary hearings without the benefit of receiving and reviewing outstanding discovery requests.

Background

On November 29, 2001, SELP and Fibertechologies Networks, LLC (“Fibertech”) jointly filed a motion to temporarily suspend the procedural schedule in this case in the interests of administrative economy and efficiency, for the purpose of allowing the parties to pursue settlement discussions during the suspension period without having to simultaneously direct resources toward ongoing matters such as discovery. Prior to the filing of that motion, the parties held a conference call with the Hearing Officer. At that time, Fibertech formally announced through counsel that it believed

that if the matter did not settle, it could proceed on a “summary judgment” basis. In fact, SELP had taken the position from the very beginning of this matter that only questions of law were raised by Fibertech’s complaint and that the matter would be best handled on cross-motions for summary judgment. E.g., Hearing Officer Ruling on Procedural Schedule and Petition to Intervene, D.T.E. 01-70 at 3 (October 26, 2001). Indeed, it was Fibertech who has insisted all along that formal evidentiary hearings were necessary in this matter. Id.

On November 30, 2001, the Department granted the joint motion, permitting a temporary suspension of the schedule until December 10, 2001 at 3 p.m. The Department granted extensions of that date until December 14, 2001, when the parties notified the Hearing Officer that a settlement had not been reached. At that status conference, the Hearing Officer indicated that the Department would hold additional procedural conference in this matter on December 20, 2001 at 10:00 a.m. The Hearing Officer asked the parties to submit proposed procedural schedules, along with their “view” of the proceedings (i.e., whether hearings were necessary or if the matter could proceed on summary judgment) by the close of business on December 18, 2001.

I. SELP’S POSITION ON PROCEEDINGS

The Department’s regulations on pole attachments provide for a streamlined process for adjudicating access disputes. See e.g., 220 C.M.R. 45.08. Consistent with this streamlined approach, SELP suggested at the first procedural conference in this matter that since neither party disputed the essential facts, the matter could be handled on a summary judgment basis. SELP’s view of the essential facts for a pole attachment dispute are as follows: Fibertech made a request; and SELP rejected it on the grounds that it does not believe Fibertech is a “licensee,” and dark fiber is not an “attachment” under the pole attachment statute, G.L. c. 166, § 25A, and the Department’s regulations, 220 C.M.R. 45.02.

SELP saw no need for evidentiary hearings, reasoning that questions of law are better addressed on brief, and not through the filing of testimony and cross-examination of witnesses . Fibertech, however, disagreed, and refused to waive its right to a hearing under 220 C.M.R. 45.04(2)(i). Fibertech insisted that pre-filed testimony and evidentiary hearings were necessary:

...testimony is called for in this case because that testimony as to the definition of what is a licensee for the purpose of the regulations... requires testimony concerning dark fiber in the telecommunications industry as well as testimony about Fibertech's business plans.

Transcript of Public Hearing in D.T.E. 01-70, October 18, 2001 (hereinafter, "Tr.I") at 8-9.¹

If Fibertech had agreed to SELP's approach in the beginning, it is highly likely that proceedings would be concluded by now, and the parties would be waiting for the Department's final decision and order. SELP – a public entity with limited resources – played by Fibertech's rules and filed testimony of its lone witness, Thomas Josie, SELP's General Manager; issued discovery on Fibertech's lengthy prefiled testimony (much of which contains, inappropriately, legal analysis and argument); and answered reams of discovery requests propounded by Fibertech within the prescribed period of time. Suddenly, after SELP had filed its second motion to compel responses to certain discovery requests, Fibertech suggested that the parties not only discuss settlement, but also consider, in the event settlement discussions were unsuccessful, handling the matter via cross-motions for summary judgment, canceling hearings, and thereby avoiding outstanding discovery matters.

It is clear that during discovery, SELP asked questions that Fibertech did not like and did not wish to answer, and caused Fibertech to change its mind about how to best proceed -- strategically

¹ Ironically, while Fibertech put its "business plans" at issue in this proceeding from the very beginning, it has, to date, refused to answer any discovery on such plans. See e.g., SELP's Motion to Compel Responses to Information Requests, November 20, 2001, at 2 and 5-6.

speaking -- before the Department. This begs the question of whether Fibertech will simply change its mind again, based on its strategy needs, at further expense to administrative efficiency, and SELP's ratepayers. The Department's regulations would appear to prohibit any party from being able to dictate the nature of proceedings at will. See 220 C.M.R. 45.06 ("If a full hearing is to be convened, the procedures contained in 220 C.M.R. 1.06 et seq. shall apply.")

SELP simply cannot agree that the parties and the Department can now just change gears and proceed on a summary judgment basis after Fibertech forced it to engage in all the preparations attendant with full-blown evidentiary hearings.² The information that SELP requested in its discovery of Fibertech may very well be the information that has led Fibertech to change its strategy and seek to proceed on cross-motions for summary judgment. While SELP certainly initially believed that this matter could have proceeded on summary judgment motions based on the complaint and response alone, it now appears that Fibertech may have either purposely, or unwittingly, created several potential issues of material fact through the conflicting and confusing testimonies of its witnesses.³ In turn, this has made a decision by SELP on the appropriateness of summary judgment in this matter impossible until SELP receives the outstanding discovery it is owed by Fibertech. Accordingly, SELP respectfully

² Fibertech mentioned at the last status conference in this matter that should the Department find, after the parties filed cross-motions for summary judgment, that in fact the matter could not be resolved completely on a summary judgment basis, then Fibertech could withdraw its case without prejudice and re-file. Ostensibly, SELP would then have to spend more public funds to file the same discovery on undoubtedly the same testimony as had been previously filed by Fibertech. If Fibertech's real concern here is, for example, the 180-day deadline imposed by the Department's regulations, then it can assent to an extension of that date by however many days may be necessary for the Department to render a final decision. If Fibertech is truly interested in resolving this dispute in a timely manner, then agreeing to a short extension for the Department to issue a decision on its complaint would be preferable to refile its complaint and allowing the "180-day clock" to begin ticking again. Moreover, SELP notes that if the Department is able to render a final decision in this case in slightly more than 180 days, such a turnaround would still be expeditious, considering the delay caused by Fibertech's failure to respond to information requests and its ever-changing procedural strategy.

³ For example, Fibertech's witness claims that "dark fiber is being used to provide competitive telecommunications services in Massachusetts." Lundquist Testimony, p. 19, line 13. However, discovery responses indicate that none of Fibertech's customers do business in Massachusetts. Response to SELP 1-6, 2-12.

requests that the Department adopt a procedural schedule for resolution of discovery disputes and the filing of outstanding discovery responses, after the receipt of which SELP and the Department can decide whether to proceed on a summary judgment basis (see proposed schedule in Section II.)

In the alternative, if the parties were to proceed on cross-motions for summary judgment, the only materials that such motions could be based upon would be the complaint, the response, supporting documentation for each of those pleadings, and any discovery responses related solely to those two pleadings (i.e., including but not limited to responses to SELP's first set of information requests and Fibertech's first and second sets of information requests.) The prefiled testimonies and discovery responses on those would have to be entirely eliminated from the record. Otherwise, Fibertech will have succeeded in creating a "hybrid" proceeding in which the record consists of the pre-filed testimony of witnesses who are never subjected to the rigors of cross-examination and the complainant is permitted to avoid discovery requests it finds inconvenient or potentially harmful to its case. (A potential schedule for summary judgment is discussed below.) Pursuant to 220 C.M.R. 45.04, and the "law of the case" established by the Hearing Officer Ruling on the Procedural Schedule in this matter, if SELP cannot agree at this time to waive its equal right to formal hearing, this matter must proceed as originally ordered by the Department. Hearing Officer Ruling on Procedural Schedule and Petition to Intervene, D.T.E. 01-70 at 3 (October 26, 2001.) If SELP ultimately rejects the summary judgment process and requests a hearing, then it should receive the same ruling that Fibertech did when it rejected the summary judgment process and requested a formal hearing.

II. PROPOSED SCHEDULES

SELP proposes the following procedural schedule and due dates (all deadlines are assumed to be by 5 p.m.), which will permit it to decide whether it can agree to proceeding on a summary judgment basis, assuming a ruling from the Department on the proposals for procedural schedules is issued after December 25, 2001⁴:

- ?? Third set of discovery responses - 1 day after ruling from DTE on procedural schedule (“procedural ruling”)⁵
- ?? SELP’s opposition to Fibertech’s 11/28 motion to compel – 1 day after procedural ruling
- ?? Motions to compel (if necessary) related to third set – 3 days after responses received
- ?? Oppositions to motions to compel – 3 days after motions filed
- ?? [DTE issues ruling on all motions to compel]
- ?? If outstanding responses from third set are compelled by DTE ruling on motions to compel, they will be due 1 day after ruling
- ?? SELP’s Letter Filing to Department on appropriateness of summary judgment – due 3 days after receiving responses
- ?? Fibertech’s opposition or response, if any, to SELP’s letter filing – 3 days after SELP’s filing
- ?? [DTE issues ruling on summary judgment issue]
- ?? If evidentiary hearings are to be held -- 3 days after DTE ruling on summary judgment issue if necessary
- ?? Simultaneous initial briefs – 15 days after hearings end or when record closes, whichever is later

⁴ SELP understands that opposing counsel and other individuals involved in this proceeding have scheduled vacations from December 24 to December 28 or January 2, 2002, and obviously would not oppose a delay in the Department’s ruling on this matter until after that time.

⁵ Note that the parties have informally agreed to provide each other with outstanding discovery responses (that are not the subject of pending motions to compel) this week.

?? Simultaneous reply briefs – 15 days after initial briefs filed

In the event that the Department orders the parties to proceed with summary judgment after the procedural conference on December 21, 2001, (again, assuming a ruling date after December 25, 2001 on the issue of procedural schedules) SELP proposes the following schedule:

?? Simultaneous cross-motions for summary judgment – 21 days after DTE ruling on procedural schedules

?? Simultaneous oppositions – 15 days after cross-motions filed

CONCLUSION

In closing, SELP's proposed schedule (1) allows SELP and the Department to review and consider the outstanding information request responses which may elucidate core issues in this case; (2) allows SELP and the Department to make an informed decision regarding the appropriateness of a summary judgment approach to this case in light of the outstanding information request responses; and (3) enables the Department to rule on Fibertech's complaint in a timely manner.

Respectfully submitted,

SHREWSBURY'S ELECTRIC
LIGHT PLANT

By its attorneys,

Kenneth M. Barna
Diedre T. Lawrence
Rubin and Rudman, LLP
50 Rowes Wharf
Boston, MA 02110
(617) 330-7056

Dated: December 18, 2001

